82-1373

No.

IN THE

Supreme Court of the United States

October Term, 1982

ERNEST G. MILLER,
Claimant/Petitioner

against

PITTSTON STEVEDORING CORPORATION, and NEW JERSEY MANUFACTURERS INSURANCE COMPANY,
Employer/Carrier Respondents

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Federal Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EUGENE CIPRIANI, Esq.
c/o JAMES J. GALLO, Esq.
Attorney for Claimant/Petitioner
26 Journal Square
Jersey City, NJ 07306
(201) 624-0850

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the Administrative Law Judge erroneously construed the Court's decisions in *P.C. Pfeiffer Co. v. Ford*, 444 U. S. 69 (1979) and *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249 (1977), by holding that petitioner did not satisfy the status requirement of 33 U. S. C. 902(3) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. 901 *et seq.*, thereby precluding him from collecting workmen's compensation under that Act, when the Court's decisions in *P.C. Pfeiffer* and *Caputo* indicate that petitioner qualifies under the aforementioned Act's status requirement because of the petitioner's participation in the loading and unloading process of maritime work?

2. Whether the lower Court erred in upholding the Benefits Review Board's

decision that since it had found the petitioner did not meet the situs requirement of 33 U. S. C. 903(a) of the aforementioned statute, it did not have to rule on petitioner's status as a maritime worker under 33 U. S. C. 902(3) of the same Act?

3. Whether the Administrative Law Judge, the Benefits Review Board, and the lower Court erroneously construed the Court's decisions in *P.C. Pfeiffer Co. v. Ford*, 444 U. S. 69 (1979) and *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249 (1977), by holding that petitioner was not injured on a situs covered by 33 U. S. C. 903(a) of the aforementioned Act, despite evidence that in his maritime capacity as deliverer of important loading and unloading ship gear to another pier, the situs of the petitioner's accident was covered by the amendments?

PARTIES.

The parties in the trial Court below were the petitioner, Ernest G. Miller, the Employer respondent, Pittston Stevedoring Corporation and the Carrier respondent, New Jersey Manufacturers Insurance Company, and the Federal respondent, Director, Office of Workers' Compensation Programs.

TABLE OF CONTENTS.

Page

Questions Presented for Review . . i

Parties iii

Opinions Below 2

Grounds on Which Jurisdiction is Invoked 2

Constitutional and Statutory Provisions Involved . . . 4

Statement of the Case 5

POINT I. Petitioner was a maritime employee as defined by 33 U.S.C. 902(3), and interpreted by the Court in P.C. Pfeiffer Co. v. Ford, 44 U.S. 69 (1979) and Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977). The Administrative Law Judge, the Benefits Review Board, and the lower Court's determination that he was not

Page

a maritime employee denies the petitioner his rights under the aforementioned statute. This presents a substantial federal question not heretofore determined by this Court . 10

POINT II. The situs of petitioner's accident was covered under the amendments. The Administrative Law Judge, the Benefits Review Board and the court below wrongly construed this Court's decisions in P.C. Pfeiffer Co. and Caputo as to what qualifies as a situs for 33 U.S.C. §903(a) purposes. Because of this faulty interpretation of P.C. Pfeiffer Co. and Caputo by the lower courts, petitioner

Page

has been denied his rights under the aforementioned statute. This presents a substantial federal question not heretofore determined by this court 19

CONCLUSION. This Court should grant certiorari and the judgment below should be reversed 26

INDEX TO APPENDIX.

A. Opinion of the United States Court of Appeals for the Third Circuit 1a

B. Opinion of the Benefits Review Board 1b

C. Opinion of the Administrative Law Judge 1c

Page

D. Text of 33 U.S.C. §902(3), 33 U.S.C. §903(a), 28 U.S.C. §1254(1) 1d

TABLE OF AUTHORITIES.

CASES:

Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977) . . .8, 10, 11, 13, 16 17, 18, 19, 22, 25

P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979) . . 8, 9, 10, 14 15, 16, 17, 18, 19 20, 22, 26

Sealand Serv. v. Director, Office of Workers' Compensation, 540 F.2d 629 (C.A. 3, 1976) 20, 23

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

- X

ERNEST G. MILLER,

Claimant/Petitioner,

against

PITTSTON STEVEDORING CORPORATION, and NEW JERSEY MANUFACTURERS INSURANCE COMPANY,

Employer/Carrier Respondents,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Federal Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

- X

OPINIONS BELOW.

The Administrative Law Judge's decision below is unreported, and is appended hereto as Appendix C.

The Benefits Review Board's decision is unreported, and is appended hereto as Appendix B.

The Court of Appeals' decision is unreported, and is appended hereto as Appendix A.

GROUNDS ON WHICH JURISDICTION IS INVOKED.

1) The nature of the proceeding. Petitioner, who has been working as a longshoreman since 1968, filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. 901 *et seq.*, subsequent to an accident he suffered while in the employ of his employer, after which

he was rendered temporarily totally disabled. Petitioner, who testified that his duties as a longshoreman include going aboard a ship and loading and unloading cargo in a warehouse by means of a forklift, which he operates, was injured while driving a trailer loaded with ship gear to another pier owned by his employer.

The Administrative Law Judge of the United States Department of Labor denied the petitioner's claim by decision and order, dated June 25, 1980 on the grounds that the petitioner had not met either the status or situs requirements of 33 U. S. C. §902(3) and §903(a) of the aforementioned statute. On appeal, the Benefits Review Board sustained the denial of the claim on the sole basis that petitioner had failed to satisfy the situs requirement of 33 U. S. C. §903(a) of

the Act. The Board's decision and order was dated February 22, 1982. This is an appeal from the decision of the United States Court of Appeals for the Third Circuit affirming the order of the Benefits Review Board.

2) The judgment or decree sought to be reviewed was dated and entered on November 16, 1982.

3) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U. S. C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution, Article III, Section 2.

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United

> States, and Treaties made, or which shall be made, under their Authority; ... to all Cases of admiralty and maritime Jurisdiction ..."

33 U. S. C. §902(3) - refer to Appendix D for text of this provision.

33 U. S. C. §903(a) - refer to Appendix D for text of this provision.

28 U. S. C. §1254(1) - refer to Appendix D for text of this provision.

STATEMENT OF THE CASE.

Petitioner, a 35 year old man with a tenth grade education, has been employed as a longshoreman since 1968. He is a member of the International Longshoreman's Association and is classified as a Hold Man. Petitioner has testified that his duties as a longshoreman include going aboard a ship and loading and unloading cargo in a warehouse by means of a fork-lift, which he operates.

Petitioner testified (without contradiction) that on the third, fourth, and sixth days of May, 1978, he did longshoring jobs, and that he did longshoring jobs on the thirteenth and fourteenth of June, 1978. On other days, he was a truck or trailer driver. A calendar of such information was kept by the petitioner and was submitted and accepted at the hearing.

The employer does not deny that it used petitioner, as well as other longshoremen, to transport cargo and gear to various other piers at which they performed stevedoring operations of loading and unloading. The employer used petitioner, as well as other longshoremen, because it was convenient to do so and because it was an integral part of their longshore operations.

Petitioner was not hired from the outside, as an independent truck driver.

On June 23, 1978, petitioner was assigned the task, by his supervisor for the employer, Ronald Petrocelli, of driving a trailer from Port Newark, New Jersey to a marine terminal at Wilmington, Delaware. Petrocelli testified that on the aforementioned date, he and the petitioner loaded the ship gear aboard the trailer. The Administrative Law Judge found that the gear was to be used in the loading and unloading of a car ship berthed in Wilmington, Delaware.

Later in the afternoon, shortly after departing from Port Newark to deliver the trailer loaded with ship gear to Wilmington, Delaware, a front tire on petitioner's truck blew out on the New Jersey Turnpike, resulting in an accident, which has left petitioner temporarily totally disabled.

Petitioner filed for compensation under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. 901 *et seq.* (hereinafter, the Act). Administrative Law Judge Reno E. Bonfanti issued a decision and order in favor of the employer, Pittston Stevedoring Corporation, and the insurance carrier, New Jersey Manufacturers Insurance Company (N.J.M.). The Administrative Law Judge, relying upon the Court's decisions in *P.C. Pfeiffer Co. v. Ford*, 444 U. S. 69 (1979) and *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249 (1977), held that the petitioner satisfied neither the status requirement of the Act (33 U. S. C. 902[3]), nor the situs requirement (33 U. S. C. 903[a]). The Benefits Review Board (BRB 80-1052) upheld the Administrative Law Judge's decision on the ground that the petitioner

did not satisfy the situs requirement of 33 U. S. C. 903(a). The United States Court of Appeals for the Third Circuit, relying upon the Court's decisions in *P.C. Pfeiffer Co.* and *Caputo*, upheld the decision and order of the Benefits Review Board.

Petitioner is being denied his statutory right to collect compensation under the Act, because of the lower court's erroneous construction of the Court's decisions in *P.C. Pfeiffer Co.* and *Caputo*. Under a proper interpretation of these decisions, the petitioner would satisfy both the status requirement of §2(3) and §3(a). Because of the erroneous construction of *P.C. Pfeiffer Co.* and *Caputo*, petitioner has been denied his statutory right to compensation under the Act. As a result of this denial, petitioner has suffered appreciable financial loss, as

well as mental anguish. This presents a substantial Federal question not heretofore determined by this Court.

POINT I.

PETITIONER WAS A MARITIME EMPLOYEE AS DEFINED BY 33 U. S. C. 902(3), AND INTERPRETED BY THE COURT IN *P.C. PFEIFFER CO. v. FORD*, 444 U. S. 69 (1979) AND *NORTHEAST MARINE TERMINAL CO. v. CAPUTO*, 432 U. S. 249 (1977). THE ADMINISTRATIVE LAW JUDGE, THE BENEFITS REVIEW BOARD, AND THE LOWER COURT'S DETERMINATION THAT HE WAS NOT A MARITIME EMPLOYEE DENIES PETITIONER HIS RIGHTS UNDER THE AFOREMENTIONED STATUTE. THIS PRESENTS A SUBSTANTIAL FEDERAL QUESTION, NOT HERETOFORE DETERMINED BY THIS COURT.

We are not unmindful of the strict requirements governing an individual's right to collect compensation under 33 U. S. C. 901 *et seq.*, or the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972. The amended provisions at issue here are the status requirement of 33 U. S. C. 902(3) and the situs requirement of 33 U. S. C.

903(a). In order to collect compensation under the Act, a worker must meet the statutory definition of employee under §2(3), as well as be injured on a situs covered by §3(a). It is the former provision that we shall *first deal with*.

In 1972, Congress amended §2(3) to include within the Act's coverage "any person employed in maritime employment, including any longshoremen or other person engaged in longshoring operations, and or harborworkers, including a ship repairman, shipbuilder, and shipbreaker."

In *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. at 273, this Court in discussing the requirements of §2(3), noted that "the Act focuses primarily on occupations - longshoreman harbor worker, ship repairman, shipbuilder, shipbreaker." Both the text and the history demonstrate a desire to provide continuous coverage

throughout their employment to these amphibious workers who, without the 1972 Amendments, would be covered only for part of their activity. It seems clear, therefore, that when Congress said it wanted to cover "longshoremen" it had in mind persons whose employment is such that they spend at least some of their time in indisputable longshoring operations, and who, without the 1972 Amendments, would be covered for only part of their activity.

Now clearly, the petitioner fits within these boundaries. The fact that he drove the truck under his supervisor's orders notwithstanding, the petitioner's noncontested testimony established that he spent at least some of his time engaged in indisputably longshoring operations, such as loading and unloading cargo in a warehouse, or going aboard a ship.

Furthermore, this Court's decision in *Caputo* implies that even if the petitioner had never engaged in so-called traditional longshoring tasks he would be covered by the 1972 Amendments to the Act. This is in great part, due to the Court's recognition of the changing nature of longshoring operations. In particular, this Court in *Caputo* noted the impact of containerization on the way ships are loaded and unloaded. In *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. at 271, the Court states that the respondent in question, whose job it "was to check and mark items of cargo as they were unloaded from a container," was "a statutory 'employee' when he slipped on the ice." The Court noted on the same page that "this task is clearly an integral part of the unloading process as altered by the advent of containerization and was intended

to be reached by the Amendments." Accordingly, the petitioner must also be assumed to be a statutory "employee" for purposes of coverage by the Act. He was injured while transporting ship gear to another pier, gear, which without the use of, it would be impossible to load or unload the cars from the ship. Clearly, this task is as much an integral part of the loading process as checking is.

In *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U. S. at 80 (1979), this Court refused to limit §2(3) coverage merely to those land based workers who handle containerized cargo. This Court stated on the same page that "land based workers who do not handle containerized cargo also may be engaged in loading, unloading, repairing, or building a vessel."

The petitioner was not handling containerized cargo when he was injured, but

he was an integral part of the loading and unloading process for the car ship berthed at Wilmington, Delaware.

The Court recognized that the crucial factor in determining whether an individual is a maritime employee is in the nature of the employment, not the location. *P.C. Pfeiffer Co. v. Ford*, 444 U. S. at 83. Thus, the fact that the petitioner was injured while driving on the New Jersey Turnpike is immaterial in a consideration of his status as a maritime employee under §2(3).

The nature of the petitioner's assignment on the day he was injured was to deliver the unloading gear to Wilmington so that the car ship could be unloaded. In *P.C. Pfeiffer Co. v. Ford*, 444 U. S. at 83, this Court noted that "persons moving cargo directly from ship to land transportation are engaged in maritime employ-

ment. A worker responsible for some portion of that activity is as much an integral part of the process of loading and unloading a ship as a person who participated in the entire process." It is undeniable that petitioner was responsible for some portion of the loading and unloading process, so he has clearly met the status requirement of §2(3).

Finally, I would like to discount an almost identical limitation made by this Court in both *P.C. Pfeiffer Co.* and *Caputo* as inapplicable to the circumstances of petitioner's case. In *P.C. Pfeiffer Co.*, 444 U. S. at 83, this Court noted "there is no doubt, for example, that neither the driver of the truck carrying cotton to Galveston, nor the locomotive engineer transporting military vehicles from Beaumont, was engaged in maritime employment even though he was working on the maritime

situs. Such a person's 'responsibility is only to pick up stored cargo for further transshipment'."

In *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. at 267, this Court stated "the example also makes it clear that persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, employees such as truck-drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered."

Although the petitioner drove a truck, he must be distinguished from the category of workers this Court justly disqualified from the Act's coverage in *P.C. Pfeiffer Co.* and *Caputo*. The categories specifically eliminated from coverage by this

Court's language played no role at all in the loading or unloading process, while the petitioner's role in delivering ship gear to load and unload cars, was critical. In addition, those categories of workers specifically disqualified by this Court had at no time engaged in the traditional work role of the longshoreman, while uncontested testimony establishes that the petitioner worked in this role at least several days during the month he was injured.

We feel that the petitioner's work role before and on the day he was injured qualifies him to satisfy the status requirement of §2(3).

We feel that his qualifying status as a maritime employee under that statute is consistent with this Court's interpretation of that statute in *P.C. Pfeiffer Co.* and *Caputo*. We feel the lower Court

erred in its construction of this Court's decisions in those cases. As a result, the petitioner is being denied his statutory right to compensation under the Act. This, we submit, raises an important Federal question which this Court must resolve.

POINT II.

THE SITUS OF PETITIONER'S ACCIDENT WAS COVERED UNDER THE AMENDMENTS. THE ADMINISTRATIVE LAW JUDGE, THE BENEFITS REVIEW BOARD, AND THE COURT BELOW WRONGLY CONSTRUED THIS COURT'S DECISIONS IN *P.C. PFEIFFER CO.* AND *CAPUTO*, AS TO WHAT QUALIFIES AS A SITUS FOR 33 U. S. C. §903(a) PURPOSES. BECAUSE OF THIS FAULTY INTERPRETATION OF *P.C. PFEIFFER CO.* AND *CAPUTO* BY THE LOWER COURTS, PETITIONER HAS BEEN DENIED HIS RIGHTS UNDER THE AFOREMENTIONED STATUTE. THIS PRESENTS A SUBSTANTIAL FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT.

In *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249, this Court at 432 U. S. 252, quoted 33 U. S. C. 903(a):

> "Compensation shall be payable ... in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining piers, wharf, drydock, terminal, building way, railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel ..."

In *Sealand Serv. v. Director, Office of Workers' Compensation*, 540 F. 2d 629 (C.A. 3, 1976), the Court suggested that so long as the status requirement was satisfied under §2(3), then there was no real situs requirement under §3(a) as long as it was established that the claimant was an employee "engaged in maritime employment."

The Court, in *P.C. Pfeiffer Co. v. Ford*, 444 U. S. at 80, in footnote 8, stated, "in fact, the language of the

situs requirement lends independent support to the conclusion that Congress focused on occupation rather than location."

By this Court's language in footnote 8, we can infer support of *Sealand's* proposition that once the status requirement of §2(3) is met the situs requirement of §3(a) is satisfied as well if the maritime worker was injured during the course of his employment.

Certainly, if the petitioner meets the status requirement because he was injured while engaged in the loading and unloading process, then he must also meet the situs requirement, since it must be assumed that since he was a maritime worker for purposes of §2(3), and he was injured while carrying out his duties as a maritime worker, then he must have been injured on a covered situs. To affirm

the worker's employee status under §2(3) while rejecting his situs under §3(a) would be a gross contradiction, or at the very least show the statute to be seriously flawed. We do not believe the statute to be flawed, but under the circumstances of the petitioner's case, we feel that a recognition of the *Sealand* holding would be the proper interpretation of the statute.

I would like to point out that this Court in *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249, like in *P.C. Pfeiffer Co. v. Ford*, 444 U. S. 69 (1979), was not called upon to answer the question whether a highway route used for purposes of transporting unloading gear was a situs for purposes of §3(a), but dealt with more traditional situs questions. However, this Court in *Caputo* did not set any specific limitations on what consti-

tuted a situs for purposes of §3(a), and a positive inference in the petitioner's favor must be drawn from that.

Even if the Court's holding in *Sea-land Serv. v. Director, Office of Workers Compensation*, 540 F. 2d 629 (C.A. 3, 1976), were to be rejected by this Court, the petitioner still qualifies for situs coverage under the "other adjoining area" language of §3(a).

The petitioner at the time of his accident on the New Jersey Turnpike was delivering ship gear by trailer from his employer's pier at Port Newark to his employer's pier at Wilmington, Delaware. Uncontested testimony at the Administrative hearing established that this ship gear was to be used in the loading or unloading of a car ship at his employer's pier at Wilmington. Furthermore, additional uncontested testimony established

that it was customary for the employer to use the petitioner as well as other longshoremen to transport cargo and gear to other piers, at which they performed stevedoring operations of loading and unloading. The employer used the petitioner and other longshoremen, because it was convenient to do so and because it was an integral part of their longshoring operation.

Therefore, because the ship gear which the petitioner carried in his trailer was critical to the loading and unloading process, and because this was customarily done, the stretch of New Jersey Turnpike where the accident occurs satisfies §3(a) as an "adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel ...," in other words, a situs.

Finally, the Courts below ignored the legislative intent to have 33 U. S. C. 903(a) and 33 U. S. C. 902(3) liberally construed. This Court noted the same in *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. at 273. "The Act focuses primarily on occupations -- longshoreman, harbor worker, ship repairman, shipbuilder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers, who, without the 1972 Amendments, would be covered only for part of their activity. It seems clear, therefore, that when Congress said it wanted to cover 'longshoremen' it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity."

Petitioner satisfies the situs requirement of §3(a). We feel the lower Court erred in its construction of *P.C. Pfeiffer Co.* and *Caputo*, in denying petitioner his coverage under the Act. As a result, the petitioner is being denied his statutory right to compensation under the Act. This, we submit, raises an important Federal question which this Court must resolve.

CONCLUSION.

This Court should grant certiorari and the judgment below should be reversed.

DATED: February , 1983.

Respectfully submitted,

EUGENE CIPRIANI, ESQ.,
c/o JAMES J. GALLO, ESQ.
Attorney for Claimant/
Petitioner
26 Journal Square
Jersey City, N.J. 07306

APPENDIX A.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 82-3146

- X

ERNEST G. MILLER,

Claimant/Petitioner,

vs.

PITTSTON STEVEDORING CORP., and NEW JERSEY MANUFACTURERS INSURANCE COMPANY,

Employer/Carrier Respondents,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Federal Respondent.

- X

Petition for Review
Benefits Review Board
(OWCP No. 2-54832)

Submitted Under Third Circuit Rule 12(6)
November 16, 1982
Before: ALDISERT, SLOVITER, and ROSENN,
Circuit Judges.

JUDGMENT ORDER.

After considering the contentions of the petitioner and the employer-carrier respondents, and applying the teachings of *P.C. Pfeiffer Co. v. Ford*, 444 U. S. 69 (1979), and *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249 (1977), it is

ADJUDGED and ORDERED that the petition to set aside the order of the Benefits Review Board be and the same is hereby denied.

Costs taxed against petitioner.

BY THE COURT,

s/ ALDISERT
Circuit Judge

Attest:

s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

DATED: November 16, 1982

APPENDIX B.

OPINION OF THE BENEFITS REVIEW BOARD.

BENEFITS REVIEW BOARD

U. S. DEPARTMENT OF LABOR

No. 80-1052

- X

ERNEST G. MILLER,

Claimant-Petitioner,

v.

PITTSTON STEVEDORING CORPORATION and NEW JERSEY MANUFACTURER'S INSURANCE COMPANY,

Employer/Carrier-Respondents.

- X

Appeal from the Decision and Order of Reno E. Bonfanti, Administrative Law Judge, United States Department of Labor.

Paul A. Gritz, Jersey City, New Jersey, for the claimant.

Leonard J. Linden (Linden & Gallagher), Jersey City, New Jersey, for the employer/carrier.

Before: RAMSEY, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

PER CURIAM:

This is an appeal by the claimant from the Decision and Order (79-LHCA-2027) of Administrative Law Judge Reno E. Bonfanti pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter, the Act).

The administrative law judge found that claimant was not engaged in employment within Section 2(3), 33 U.S.C. §902(3), and was not injured on a situs covered by Section 3(a), 33 U.S.C. §903(a). Therefore, he denied claimant benefits under the Act. Claimant appeals, arguing

that he was entitled to coverage under the Act. In addition, claimant argues that the administrative law judge erred in re-opening the record to permit employer to bring in an additional witness.

Preliminarily, we hold that the administrative law judge's decision to reopen the record was not an abuse of his discretion. 20 C.F.R. §702.338; 20 C.F.R. §702.347.

Moreover, having carefully reviewed the record and considered claimant's arguments in this case, we conclude that the administrative law judge's determination that claimant was not injured on a situs covered by Section 3(a) is supported by substantial evidence in the record considered as a whole, is rational and is in accordance with law. 33 U.S.C. §921 (b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359

(1965). Therefore, the administrative law judge properly denied claimant benefits.

In light of this determination with regard to Section 3(a), it is unnecessary for us to reach the Section 2(3) issue.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

s/_____
ROBERT L. RAMSEY, Chief
Administrative Appeals
Judge

s/_____
JULIUS MILLER
Administrative Appeals
Judge

s/_____
ISMENE M. KALARIS
Administrative Appeals
Judge

Dated this 22nd
day of February 1982

FILED AS PART
OF THE RECORD
FEB 22 1982
(date)

Agnes Kurtz
(Clerk)
Benefits Review Board

APPENDIX C.

OPINION OF THE ADMINISTRATIVE LAW JUDGE.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
WASHINGTON, D.C. 20036

- X

IN THE MATTER

of

ERNEST G. MILLER,

Claimant,

vs.

PITTSTON STEVEDORING CORPORATION,

Employer,

NEW JERSEY MANUFACTURES INS. CO.,

Carrier.

- X

Case No. 79-LHCA-2027

OWCP No. 2-54823

Paul Gritz, Esq., for the Claimant.

Leonard J. Linden, Esq., for the Employer/Carrier.

Before: Reno E. Bonfanti
Administrative Law Judge

DECISION AND ORDER.

This is a claim for workmen's compensation benefits under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*

The parties stipulated and I accept the following: (1) the employer-employee relationship existed, (2) claimant's injury arose out of and during the course of his employment, (3) claimant was injured on June 23, 1978 and remains temporarily totally disabled, (4) claimant was injured in an accident on the New Jersey Turnpike when he was driving a tractor trailer truck enroute from Port Newark,

New Jersey to Wilmington, Delaware, (5) the truck contained rigging or ship's gear to be used in loading or unloading of a car ship in Wilmington, (6) claimant's average weekly wage at the time of the accident was $355, for a compensation rate of $236.67, (7) claimant filed timely notice of the injury (8) claimant is receiving compensation for this injury under the New Jersey Compensation Act, (9) employer filed a notice of controversion on April 18, 1979.

The parties agree that the sole remaining issue in this case is the question of jurisdiction under the Longshore Act. This hinges upon whether the claimant meets the "status" and "situs" requirements of Sections 2(2) and 3(a) respectively, of the Act.

EVALUATION OF THE EVIDENCE.

The 33 year old claimant with a 10th grade education began working as a longshoreman in 1968. He is a member of the ILA and has a union card indicating his job as a HOLD MAN. He testified that he goes aboard ship in addition to loading and unloading ship cargo in the warehouse by driving a fork lift. The claimant testified that on the morning of June 23, 1978 he was operating a fork lift on the truck live in the warehouse, and after lunch, his supervisor (Petrocelli) told him to go to the garage and pick up the truck, load ship's gear on it, and then drive it to a pier in Wilmington, Delaware. Claimant testified that after loading the truck, he drove onto the New Jersey Turnpike and about 30 minutes later the left front tire blue out and caused the accident. He also testified that when he was

assigned to driving a truck he received $.25 more per hour than when he did other work. Claimant maintained a calendar for the months of May and June 1978 which were introduced into the record (Exhibit E-1, E-2). Claimant testified that he noted the days, hours, and job assignments on it. He testified that for the month of May 1978, on the 3rd, 4th, and 6th he did "longshore" jobs and the other days he was a truck or tractor driver. For the month of June 1978 he testified that on the 6th he was a checker (but the calendar shows "truck"), and that on the 13th and 14th he did "longshore" jobs. All other dates until June 23rd show his job as truck or trailer. There is no notation on June 23rd to indicate what work he was doing on that date because claimant testified he logged his time after the end of the day or the following workday. Ronald

J. Petrocelli, an engineer and manager of operations for Pittston, testified that approximately 3 months prior to the accident the claimant was assigned to a regular job as a truck driver to transport gear and gear parts to various places. He further testified that the claimant reported directly to him every morning. Petrocelli testified that on the morning of June 23, 1978, claimant reported directly to him, they assembled ship gear together for transport to Wilmington, claimant loaded the ship gear onto a truck, and then reloaded it onto a low bed trailer pursuant to Petrocelli's instructions, and then after lunch claimant began driving to Wilmington. Petrocelli testified that claimant did not handle any cargo on that day nor on his job as a truck driver.

After careful evaluation of the demeanor and credibility of the witnesses, I credit the testimony of Petrocelli as to the claimant's work on the date of the injury. I do not believe the claimant's testimony that he was working in the warehouse on the truck line, which he said was his "best recollection." I find that on the day of the injury his job consisted solely of loading ship's gear onto a trailer and driving it from Port Newark to a pier in Wilmington, Delaware, about 3 or 4 hours away. I find the accident in which he sustained injuries occurred on the turnpike approximately 30 minutes away from the shipyard. I find that on the date of the injury the claimant did not handle any cargo.

DISCUSSION AND CONCLUSIONS.

In order to meet the "status" requirements of Section 2(3) of the Act,

the claimant must be an employee "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, ship-builder, and ship-breaker ..." Also, the claimant must meet the "situs" requirement of Section 3(a) of the Act to establish "an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

The term "maritime employment" was defined in *Sedmak v. Perini North River Associates*, 9 BRBS 378 (1978). The Board stated that the claimant's employment must have a realistically significant relationship to maritime activities involving

navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section 2(3). This has been referred to as the necessity of a "close functional nexus," or "essential," or "integral part of" a maritime enterprise in order to be covered under the Act. In *P.C. Pfeiffer Co. v. Ford*, 100 S. Ct. 328 (1979), the Supreme Court stated that the crucial factor in the scope of maritime employment is the nature of the activity to which a worker may be assigned. In the case before me claimant was assigned the work of driving a truck, and in so doing, he was injured in a vehicle accident on a public highway, a significant distance from any shipyard or marine situs. The fact that the beginning and ending sites of his route were marine terminals does not give him "status" at any time.

Claimant's counsel cites the case of *Brady-Hamilton v. Herron*, 7 BRBS 409 (1978) to support his contention of coverage under the Act. That case is distinguishable on both status and situs grounds. The employee there was engaged in longshore work at least part of his working day and the gear locker room (2000 feet from water's edge), where he was injured, was found to be an adjoining area for loading vessels. As previously found herein, this claimant was not doing longshore work on the day of injury. In fact, for a period of 3 months he performed maritime jobs only infrequently-not more than 3 days during the month of injury and 3 days during the preceding month. It is recognized that the case of *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 mandates an expansive view toward the 1972 amendments and directs

continuous coverage for employees who would otherwise be walking in and out of federal jurisdiction during their regular performance. However, claimant herein was not in covered employment during any part of the day of injury and the accident occurred on a public turnpike, a considerable distance from navigable waters or "any adjoining area."

Recently, the case of *Fusco v. Perini North River Associates*, 601 F2d 659 (1979), was remanded to the Ct. of Appeals by the Supreme Court for reconsideration in light of the holding in *P.C. Pfeiffer v. Ford, supra*, that the term maritime employment refers to the nature of the worker's activities and that it is an occupational rather than a geographic concept. On June 4, 1980 the Ct. of Appeals (2nd Cir.) denied coverage to two sewage disposal construction workers who

were injured on a project over the water. It seems fair to conclude that Sections 2(3) and 3(a) as interpreted by case law requires that for coverage to attach, workers must meet both the "status" and "situs" criteria.

Based upon my analysis and evaluation of this record, I must conclude that the claimant has not satisfied the "status" requirements of Section 2(3) nor was the injury on a "situs" pursuant to Section 3(a) of the Act.

ORDER.

The claim for Ernest G. Miller for workmen's compensation under the Longshoremen's and Harbor Worker's Act is hereby denied.

s/_____
Reno E. Bonfanti
Administrative Law
Judge

REB/det

Dated: June 25, 1980
Washington, D.C.

APPENDIX D.

TEXT OF 33 U.S.C. 902(3), 33 U.S.C. 903(a) AND 28 U.S.C. 1254.

33 U.S.C. 902(3)

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C. 903(a)

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any

adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area, customarily used by an employer in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of ---

(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any state or foreign government or of any political subdivision thereof.

28 U.S.C. 1254

Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.